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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-540

SOUTHERN OREGON BROADCASTING CO.,
dba SOUTHERN OREGON CABLE TV,
an Oregon Corporation,

Petitioner,

v.

DEPARTMENT OF REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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No. _____

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DEPARTMENT OF REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner Southern Oregon Broadcasting Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the

Supreme Court of the State of Oregon entered in this proceeding on July 3, 1979.

OPINION BELOW

The opinion of the Oregon Supreme Court, Southern Oregon Broadcasting Co. v. Dept. of Revenue, 287 Or 35, 597 P2d 795 (1979), appears in Appendix B to this petition. No opinion was rendered by the Oregon Tax Court, but a copy of its order appears in Appendix A to this petition.

JURISDICTION

The judgment and opinion of the Supreme Court of the State of Oregon were filed on July 3, 1979. No petition for rehearing, which is discretionary in Oregon, was filed. This petition for certiorari was filed within 90 days of July 3, 1979. This court's jurisdiction is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

Would disclosure of petitioner's income records compelled by a subpoena issued by the Oregon Tax Court on behalf of the state Department of Revenue be an unreasonable search and seizure in violation of the fourth and fourteenth amendments to the United States Constitution?

What standards govern the determination of whether an administrative search is reasonable under the fourth and fourteenth amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
> (U.S. Const. amend. IV)

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
(U.S. Const. amend. XIV, § 1)

"Subpenaing and examining witnesses, books and papers; application to tax court for disobeyance of subpena. (1) The Director of the Department of Revenue, in conformity to the resolutions or rules of the department, may subpena and examine witnesses, administer oaths and order the production of any books or papers in the hands of any person, company or corporation, whenever necessary in the prosecution of any inquiries deemed necessary or proper in their official capacity."
(Ore. Rev. Stat. § 305.160)

STATEMENT OF THE CASE

Petitioner Southern Oregon

Broadcasting Company operates cable television systems in Southern Oregon, including a system in Douglas County, Oregon. Petitioner's property in Douglas County is subject to personal property taxes imposed by that county.

Respondent Department of Revenue is authorized by state law to appraise taxable property. Respondent is further empowered by state law (Ore. Rev. Stat. § 305.190(1)) to "order the production of any books or papers in the hands of any person, company or corporation, whenever necessary in the prosecution of any inquiries deemed necessary or proper in their [sic] official capacity." Pursuant to this authority, respondent served a subpoena on petitioner ordering petitioner to allow respondent to inspect the 1974, 1975 and 1976 copies of FCC Form No. 326, which is a

form that the petitioner usually files with the Federal Communications Commission each year. The form reports the earnings and expenses of plaintiff's cable television systems.

Petitioner refused to disclose these records, so the respondent applied to the Oregon Tax Court for an order to show cause why the subpoena should not be enforced. Petitioner filed a complementary motion to quash the subpoena on the ground that the records sought were not relevant to the appraisal of the property. After hearing both motions, the Tax Court held that the respondent was entitled to inspect petitioner's income records, and obtained petitioner's agreement to submit a list of its financial records. The respondent by this time wanted more records than just the FCC forms.

Petitioner submitted the list of those records, together with a memorandum protesting that an order to disclose the records would "violate the limitations imposed on the Department's subpoena power by the Oregon Supreme Court in Pope & Talbot, Inc. v. State Tax Commission," 216 Or 605, 340 P2d 960 (1959), a fourth amendment case, thus raising the constitutional issue presented in this petition. The Tax Court did not specifically rule on the constitutional issue, but ordered petitioner to make extensive records available for respondent's inspection.

A copy of the Tax Court's order is appended to this petition as Appendix A. The records covered are listed at p. 15, infra.

Petitioner then appealed to the Oregon Supreme Court and raised the

constitutional issue here presented by the following:

> "(3) Question presented for decision on appeal.
>
> "(a) Is the Oregon Tax Court's order unenforceable because it violates the Fourth Amendment of the United States Constitution . . . ."

Appellant's Brief at 1-2.

Petitioner specifically contended that the information sought was not relevant to a lawful investigative purpose of respondent, that the order requiring disclosure was not sufficiently limited in scope, and that the order placed an unreasonable burden on petitioner in the conduct of its business.

The Oregon Supreme Court did not hold that the records were relevant. It held only that it could not say at this stage of the proceedings that the records sought were not relevant. It

then affirmed the order enforcing the subpoena. It did not address petitioner's contentions regarding the scope of the order or the burden on petitioner's conduct of its business.

Petitioner thereafter obtained a stay of the Oregon Supreme Court's mandate in this case pending the determination of this petition for certiorari.

ARGUMENT

Summary

Under this court's decisions, an order to disclose information to an administrative agency is improper under the fourth amendment to the United States Constitution if the demand for information sought is too broad or if the information itself is not reasonably relevant.

The larger problem highlighted by this case is the absence of any

standards for determining whether an administrative search is "reasonable." Such standards must be stated, to prevent administrative tyranny.

Fourth Amendment Restrictions on Administrative Searches

The fourth amendment protections against unreasonable searches by state agencies apply to the states through the fourteenth amendment. Camara v. Municipal Court, 387 US 523, 525 (1967); See v. Seattle, 387 US 541, 544 (1967).

In the past, the fourth amendment provided extensive protection of business records from administrative investigation. One early case even restricted the subpoena power of an agency to cases concerning "a specific breach of the law." Harriman v. ICC,

211 US 407, 419-420 (1908). See K. Davis, Administrative Law Text, §3.01, 3.02 (3rd Ed. 1972). But this Court has since cut back on fourth amendment protections, to the current test as stated in Oklahoma Press Publishing Co. v. Walling, 327 US 186 (1946), and United States v. Morton Salt Co., 338 US 632, 652 (1950), where the Court said:

> "Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. Federal Trade Comm. v. American Tobacco Co., 264 US 298, 68 L.Ed. 696, 44 S.Ct. 336, 32 ALR 786, Supra. But it is sufficient if the inquiry is within the authority of the agency, the demand not to indefinite and the information sought is reasonably relevant. 'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.' Oklahoma Press Publish-

ing Co. v. Walling, 327 US 186, 208 . . . ."

This statement was reaffirmed in California Bankers Assn v. Shultz, 416 US 21, 67 (1974).

The "reasonableness" test, without some guidelines, is inadequate. Undefined "reasonableness" places privacy rights at the mercy of administrative agencies without setting specific guidelines to control the agencies. It allows appellate courts to rubber-stamp administrative searches without truly analyzing the reasons for the search. It is not a test at all, but only a hope that administrative agencies will be discreet in exercising effectively non-reviewable power.

This is a case in point. Petitioner's operations extend throughout southern Oregon. Its property in Douglas

County is only a small portion of its total property. It has no records, nor could it have, showing how much of its income is attributable to its property in Douglas County; a cable television operation supplies a total service to its customers, using all the equipment of the company. The distribution system in Douglas County plays a part in supplying this service, but there is no way to allocate any part of petitioner's income to that specific property. Under such circumstances, respondent's contention that petitioner's income records are relevant to the valuation of the Douglas County property is patently wrong. Petitioners unallocated income and expenses from all its divisions tell nothing of the value of petitioner's property in one county. However, the Oregon Supreme Court interpreted the

"reasonableness" test to be broad enough to uphold the subpoena in this case.

In the absence of specific standards, such miscarriages of law will continue, because the "reasonably relevant" test will be interpreted as a carte blanche for agency searches. This court must make it plain that relevance means actual relevance, not possible relevance, and that subpoenas will be quashed where, as here, the known facts indicate only that the information is not relevant.

This court must also make plain that to be reasonably relevant, the information must be sufficiently relevant so as to outweigh the difficulty and inconvenience caused, and sufficiently relevant to outweight the right of privacy which the Constitution protects. That should be what the word

"reasonable" means.

Viewing respondent's contentions in the most favorable light, all that respondent in this case was able to show is that the information sought might be relevant to one of three possible methods of appraising the petitioner's personal property, with no indication whatsoever that this method will actually be used to assess the property. The records to be produced are:

(1) Invoices covering property acquisitions;

(2) Consolidated depreciation schedule;

(3) General ledger, reflecting all the accounts of the corporation, covering the entire operations of petitioner. The ledger for one year normally consists of approximately 250 -

300 pages, 11" x 14-1/8" single spaced."

(4) Accounts receivable, another computer print-out; one years' listing takes 1300-1500 pages.

(5) Annual report, showing balance sheet, income statement, and statement of changes in the financial position of the company as a whole.

Given the great inconvenience to petitioner and the intrusion on its private affairs that would follow from enforcing the subpoena, this showing fails to establish that the disclosure sought is "reasonable" by any reasonable definition of the word. This court should supply that definition.

CONCLUSION

Morton Salt Co. and Oklahoma Press Publishing Co. establish minimum

requirements that administrative agencies must follow. If the subpoena in this case is upheld, even those minimum requirements will have been done away with, and administrative agencies will be invited to conduct fishing expeditions into any records of any business, or individual, perhaps prompted by nothing but curiosity. The concept of the privacy of records would be destroyed. To avoid this, some guideposts must be set.

This case gives this court a good fact situation to delineate standards for defining:

(1) relevance,

(2) overbreadth of inquiry,

and

(3) reasonableness of inquiry,

as compared to the burden imposed and the intrusion upon privacy.

Petitioner urges that its petition for certiorari be granted, and that the judgment of the Oregon Supreme Court be reversed.

Respectfully submitted,

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APPENDIX A

IN THE OREGON TAX COURT

No. 1210-S

SOUTHERN OREGON BROADCASTING CO., dba SOUTHERN OREGON CABLE TV,

Plaintiff,

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,

Defendant.

ORDER

In accordance with the instructions of this court, contained in its journal entry dated February 22, 1978, representatives of the plaintiff and the defendant met in Medford, Oregon, on March 3, 1978. The purpose of the meeting was to prepare a descriptive list of plaintiff's business books and records in order to eliminate confusion and to enable defendant to identify precisely the records it needs to examine to obtain essential information which would enable defendant to consider each of the three typical approaches to value when making its property appraisal of plaintiff's Southern Oregon Cable TV System at Roseburg. Defendant having advised the court which of the records are essential to its examination, now, therefore,

IT IS ORDERED that plaintiff shall make available to defendant, at the site of plaintiff's bookkeeping operations, the following records: Invoices covering property acquisitions for the Roseburg Division; Consolidated Depreciation Schedule for the Roseburg Division; General Ledger; Accounts Receivable; and Annual Report; identified as items 1, 3, 5, 7 and 13, respectively, in the "Description of Basic Financial Records of Southern Oregon Broadcasting Company Containing Information Related to Roseburg Division," a copy of which was submitted to the court by both parties. Plaintiff shall make such records available to defendant during regular business hours over a reasonable period, beginning not later than March 30, 1978.

s/ Carlisle B. Roberts, Judge

APPENDIX B

No. 119—July 3, 1979

IN THE SUPREME COURT OF THE
STATE OF OREGON

Department One

SOUTHERN OREGON BROADCASTING CO.,
Appellant,
v.
DEPARTMENT OF REVENUE, *Respondent.*
(No. TC 1210-S, SC 25696)

Appeal from the Oregon Tax Court.

Carlisle B. Roberts, Judge.

Argued and submitted November 2, 1978.

Carl M. Brophy of Brophy, Wilson & Duhaime, Medford, argued the cause for appellant. With him on the briefs was Douglass H. Schmor.

G. F. Bartz, Assistant Attorney General, Salem argued the cause for respondent. With him on the briefs was James A. Redden, Attorney General.

Before Denecke, Chief Justice, and Howell, Lent, and Linde, Justices.

LINDE, J.

Affirmed.

Lent, J., dissenting in part; concurring in part.

LINDE, J.

Plaintiff, a company operating cable television systems in southern Oregon, appeals from an order of the Oregon Tax Court requiring it to let the Department of Revenue inspect certain business records in order to appraise plaintiff's property for taxation by Douglas County.

ORS 305.190(1) empowers the Director of the Department of Revenue to "order the production of any books or papers in the hands of any person, company or corporation, whenever necessary in the prosecution of any inquiries deemed necessary or proper in their [*sic*] official capacity." Pursuant to this authority, the department served on plaintiff a subpoena which directed plaintiff to make available for inspection by a named officer of the department copies of a form filed by the company with the Federal Communications Commission covering the years 1974, 1975, and 1976 and containing the earnings and expenses of plaintiff's cable television systems. The subpoena further stated that the department needed to examine these forms in order to complete an estimate of the market value of the system for the Douglas County assessor.

To obtain compliance, the Department of Revenue thereafter filed in the tax court a motion for an order to show cause why the subpoena should not be enforced. Plaintiff in turn moved to quash the subpoena, and the department filed an answer. After a hearing on both motions, the tax court ruled that the department was "entitled to information from the taxpayer which would enable it to consider each of the three typical approaches to value." Pursuant to the court's directive, the taxpayer submitted a list of its financial records, but it maintained that its income and expense records should not be produced for the department's examination because the "income approach" was not relevant to establishing the true cash value of the property taxable by Douglas County. Thereafter, the

court entered an order directing the taxpayer to make available to the department, at the location of taxpayer's bookkeeping operations, certain specified items on the list of financial records.

On appeal from this order, plaintiff confines its objection to contending that the order violates its right to be secure in its papers and effects against unreasonable search or seizure that is guaranteed by article I, section 9 of the constitution,[1] or if not by it, then by the federal fourth and fourteenth amendments. Conceding that the subpoena would not be unconstitutional if the records were needed for the performance of the department's duties, plaintiff argues that the demand for its financial records is an unreasonable search because the records are not relevant to valuation of its taxable property. In other words, plaintiff renews here in constitutional guise its argument that the "income approach" to property valuation cannot apply to the assessment of its personal property in Douglas County. We hold that the tax court did not err in refusing to decide the propriety of considering the income approach at the preliminary stage of the department's assessment and therefore affirm the tax court's order.

There is a preliminary question of the appealability of the tax court's order that we asked the parties to address after the appeal was at issue. In response, plaintiff asserts both that the order requiring it to disclose its financial records to the department is a "final order" for purposes of appeal under ORS 305.445 and also that, under the third sentence of that section, we may review the order as an appeal from a "special statutory proceeding' within the meaning of

[1] Or Const, art I, § 9:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

ORS 19.010.[2] The "special statutory proceeding" in this case would be the proceeding for challenging a departmental subpoena that is provided by ORS 305.190(2).[3] The department agrees with the latter

[2] ORS 305.445:

"The sole and exclusive remedy for review of any decision or order of the tax court shall be by appeal to the Supreme Court. Jurisdiction hereby is vested in the Supreme Court to hear and determine all appeals from final decisions and final orders of the tax court, except with respect to the small claims division of the tax court. Such appeals, and the review of final decisions and final orders of the tax court, shall be in accordance with the procedure in equity cases on appeal from a circuit court, but without regard to the sum involved. Upon such appeal and review, the Supreme Court shall have power to affirm, modify or reverse the order or decision of the tax court appealed from, with or without remanding the case for further hearing, as justice may require."

ORS 19.010:

"(1) A judgment or decree may be reviewed on appeal as prescribed in this chapter.

"(2) For the purpose of being reviewed on appeal the following shall be deemed a judgment or decree:

"(a) An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein.

"(b) An interlocutory decree in a suit for the partition of real property, defining the rights of the parties to the suit and directing sale or partition.

"(c) A final order affecting a substantial right, and made in a proceeding after judgment or decree.

"(d) An order setting aside a judgment and granting a new trial.

"(e) A final judgment or decree entered in accordance with ORS 18.125.

"(3) No appeal to the Supreme Court shall be taken or allowed in any action for the recovery of money or damages only unless it appears from the pleadings that the amount in controversy exceeds $250.

"(4) An appeal may be taken from the circuit court in any special statutory proceeding under the same conditions, in the same manner and with like effect as from a judgment, decree or order entered in an action or suit, unless such appeal is expressly prohibited by the law authorizing such special statutory proceeding.

[3] ORS 305.190(2):

"If any person disobeys any subpena of the director, or refuses to testify when required by the director, the department may apply to the Oregon Tax Court for an order to the person to produce the books and

(Continued on following page)

view, and, although the conclusion is not free from doubt, we accept that concession. Accordingly, we proceed to the merits.

This court reviewed the subpoena powers of the predecessor of the defendant department in *Pope & Talbot, Inc. v. State Tax Commission*, 216 Or 605, 340 P2d 960 (1959). In sustaining a subpoena for a corporation's records to aid an investigation into compliance of other taxpayers with the tax laws, the court stated the constitutional limit of such powers in terms drawn from *Oklahoma Press Publishing Co. v. Walling*, 327 US 186, 66 S Ct 494, 90 L Ed Ed 2d 614 (1946) and *United States v. Morton Salt Co.*, 338 US 632, 70 S Ct 357, 94 L Ed 401 (1950): "The inquiry must be relevant to a lawful investigatory purpose and must be no broader than the needs of the particular investigation." 216 Or at 615. Unlike *Pope & Talbot, Inc.*, plaintiff in this case is itself the taxpayer whose tax liability is under examination. It concedes the lawfulness of the department's investigatory purpose, but it denies the relevance of its income and expense records on the ground that as a matter of law, the correct approach to assessing the value of its Douglas County cable system should be based on the system's cost.

(Continued from previous page)

papers or attend and testify, or otherwise comply with the demand of the department. The application to the court shall be by ex parte motion upon which the court shall make an order requiring the person against whom it is directed to appear before the court in the county in which the person resides or has a place of business on such date as the court shall designate in its order and show cause why the person should not comply with the demand of the department. The order shall be served upon the person to whom it is directed in the manner required by this state for service of process, which service shall be required to confer jurisdiction upon the court. Upon failure of such person to show cause for noncompliance, the court shall make an order requiring the person to comply with the demand of the department within such time as the court shall direct. Failure to obey any order issued by the court under this section is contempt of court. The remedy provided by this section shall be in addition to other remedies, civil or criminal, existing under the tax laws or other laws of this state."

ORS 308.205 defines the true cash value of personal property, for the purposes of taxation, as follows:

> "True cash value of all property, real and personal, means market value as of the assessment date. True cash value in all cases shall be determined by methods and procedures in accordance with rules and regulations promulgated by the Department of Revenue. With respect to property which has no immediate market value, its true cash value shall be the amount of money that would justly compensate the owner for loss of the property. With respect to property that is subject to governmental restriction as to use on the assessment date under applicable law or regulation, true cash value shall not be based upon sales that reflect for the property a market value that the property would have if the use of the property were not subject to the restriction unless adjustments in value are made reflecting the effect of the restrictions."

According to this section, the methods and procedures for determining true cash value are to be set out in rules and regulations promulgated by the department. The taxpayer cites no such rule or regulation that would make the cost of the system the one proper starting point for determining its value or that would exclude consideration of the income derived from the taxpayer's operations, allocated in some proportion to its Douglas County system, in placing a value on that system. Nor, for that matter, does the department bring to our attention any rule or regulation in which it has prescribed methods or procedures for assessing property like that used in a cable television system. Instead, the department merely invokes three "standard approaches" listed in general texts on appraisal, one being to determine the depreciated reproduction cost of the physical property, another its capitalized net earning capacity, and the third the price obtained in recent sales of comparable property.

We have recently had a number of occasions to point out that without the kind of meaningful specifications of methods and procedures suitable for differ-

ent types of property that are contemplated in ORS 308.205, *supra*, the tax court and this court cannot review a contested assessment for its consistency with an established valuation formula. Rather, both courts are left to redetermine the tax "anew upon the record" made in the tax court, ORS 305.445 and ORS 19.125(3), including the evidence both as to the proper methodology and as to the facts of the taxpayer's property. The lack of comprehensive standards and methods of assessing different types of property promulgated under ORS 308.205 in advance of the particular assessment reduces both courts from the function of clarifying law to a factfinding function and eliminates any precedential value of a decision even with respect to the same property of the same taxpayer from one year to the next. *See Pacific Power & Light Co. v. Dept. of Revenue*, ___ Or ___, ___ P2d ___ (1979); *Borden, Inc. v. Dept. of Revenue*, ___ Or ___, ___ P2d ___ (1979); *Brooks Resources Corp. v. Dept. of Revenue*, ___ Or ___, ___ P2d ___ (1979); *Bend Millwork Co. v. Dept. of Revenue*, 285 Or 577, 592 P2d 986 (1979); *cf. Medical Building Land Co. v. Dept. of Revenue*, 283 Or 69, 582 P2d 416 (1978). Without preexisting rules, "[t]he appropriateness of a particular valuation method or combination of methods is not determined by fixed principles of law, but is a factual determination that depends on the record developed in each case," as Justice Howell recently wrote in *Brooks Resources Corp.*, and the courts perform the function of factfinders and not as correctors of legal errors. ___ Or at ___. "This sometimes leads to citation of an opinion of this court for what the party conceives to be a rule of law, but which is really only a finding of fact upon the evidence in the record in the cited case." *Bend Millwork, supra,* at 581.

Under such circumstances, plaintiff's citation of *Portland Cement Co. v. Tax Commission*, 230 Or 389, 369 P2d 765 (1962), leans on a reed as shaky as any other, since the department might perhaps be able to show in this taxpayer's case what the commission had

failed to show in the record of that case. In short, the tax court could not be expected to decide upon the taxpayer's motion to quash the subpoena in the present proceeding, in advance of the evidentiary record that the department and the taxpayer might eventually make, that the approach of capitalizing the taxpayer's net income, or parts of it, could under no circumstances be relevant to the true cash value of its Douglas County property. That might be true if proper rules or regulations under ORS 308.205 indicated that a different method or procedure was appropriate, but as we have said, none has been cited.[4]

Accordingly, the tax court did not err in enforcing the subpoena.

Affirmed.

LENT, J., dissenting in part; concurring in part.

I dissent from the majority opinion on the issue of the appealability of the order. As the majority concedes, the question of our *jurisdiction* is not free from doubt. We did *not* have the advantage of true adversarial briefing in this case because the respondent[1] was apparently as anxious as the appellant for a ruling on the merits. I do not find this to be either a final order under ORS 305.445 or "[a]n appeal * * * from the *circuit court* in any special statutory proceeding * * *" (emphasis added) under ORS 19.010(4). The majority appears to render an advisory opinion upon jurisdiction bestowed by stipulation of the parties. This we have no power to do.

I concur in the reasoning of the majority upon the merits.

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[4] It appears that the department has defined some methods and procedures for the valuation of real and personal property, *see* OAR 150-308.205-(A) and 150-308.205-(B) (1978). However, neither regulation seems to furnish guidance for the present problem.

[1] The parties cannot even be labelled as plaintiff and defendant or petitioner and respondent because there is no cause pending as we usually understand that concept.